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ABSTRACT

Even though the high school publications adviser in the Hazelwood East High School Supreme Court case of 1983 was named as a petitioner with school officials, some litigation and much research indicates that advisers have often encountered administrators in an adversarial role. Because "Hazelwood" ruled that the school newspaper is part of the curriculum, an examination of federal and state court decisions focused on several issues: (1) the role of federal courts in content-control of school curricula; (2) the marketplace of ideas concept and the notion of academic freedom as applied to high school teachers; (3) the authority of schools in controlling the curriculum; (4) the conflicts that occur when school authorities' decisions conflict with teacher academic freedom; and (5) due process rights for teachers. From a teacher's point of view, the publication by journalistic tradition is a curricular tool for the practice of journalism, which includes protections provided by the First Amendment and the Constitution generally. When an administrator decides to censor such a curricular vehicle, it means that the state seems to be both violating its mandated curriculum and implementing a practice violative of the First Amendment, which it has been charged to protect in the schools. Designation of "Spectrum" (the student newspaper involved in the "Hazelwood" decision) as part of the curriculum might afford teacher-advisers a more substantial and reasonable First Amendment claim. (One-hundred eighty-two notes are included.) (Author/RS)

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POST-HAZELWOOD CONSIDERATIONS FOR HIGH SCHOOL PUBLICATIONS ADVISERS

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Abstract

POST-*HAZELWOOD* CONSIDERATIONS

FOR HIGH SCHOOL PUBLICATIONS ADVISERS

Even though the high school publications adviser in the Hazelwood East High School Supreme Court case of 1983 was named as a petitioner with school officials, some litigation and much research indicates that the adviser has often encountered an adversarial role with administrators. Because *Hazelwood* has ruled that the school newspaper is part of the curriculum, this paper explores the role of federal courts in content-control of school curricula, the marketplace of ideas concept and the notion of academic freedom as applied to high school teachers, the authority of schools in controlling the curriculum, and the conflicts that occur when school authorities' decisions conflict with teacher academic freedom.

From a teacher's (adviser's) point of view, the publication by journalistic tradition is a curricular tool for the practice of journalism, which includes protections provided by the First Amendment and the Constitution generally. When an administrator decides to censor such a curricular vehicle, it means that the state seems to be violating both its mandated curriculum and is implementing a practice violative of the First Amendment, which it has been charged to protect in the schools. A case is made that the designation of *Spectrum* at Hazelwood East as a part of the curriculum might afford teacher-advisers a more substantial and reasonable First Amendment claim.

Further analysis examines due process rights of teachers when constitutional issues are raised in situations such as found in *Hazelwood.*

POST-*HAZELWOOD* CONSIDERATIONS FOR HIGH SCHOOL PUBLICATIONS ADVISERS

I. Introduction

Following the *Hazelwood v. Kuhlmeier*[1] decision of the Supreme Court, administrators, educators and students had their first direct guidance from the nation's highest court regarding the constitutional protections afforded journalism students in secondary schools. Indeed, the 5-3 decision gave school officials much greater latitude in controlling the content of student publications than had earlier lower-court decisions.[2]

School publications advisers, who are most often full-time teachers as well, are now faced with potential dilemmas that have personal, professional, legal and educational implications not heretofore problematic. In *Hazelwood*, students sued administrative officials, including the principal, various other school district personnel and the teacher/adviser, alleging unconstitutional prior restraint.[3] While in this instance the teacher/adviser was included as one of the school officials as a defendant, much litigation -- as described below -- has shown that educators can as easily be put in adversarial relationships with their administrative colleagues.

Journalism teachers/advisers find themselves with divided loyalties. They have contracts within a school system, face

reviews by superiors, answer to administrative decrees in assisting with the orderly operation of the school, adhere to the basic curriculum required by superiors, and in many other ways support policies and practices that contribute to the efficient maintenance of the institution. On the other hand, they work with students whose very task is to create publications that are expressive -- newspapers, yearbooks and other school media. As a professional journalism educator, the adviser is trained to believe that administrative intrusion into students' First Amendment rights countermands the lessons the school ought to be teaching as well as violates basic constitutional protections students and teachers have been granted.[4]

Pedagogically journalism education teaches the democratic values of citizen involvement, oversight, outspokenness, and dissent. If Hazelwood permits censorship only on pedagogical grounds, the window of permission must be small indeed. Only under very narrow circumstances could one teach democratic values by discouraging vocal involvement in the social issues of today's society.

Inherent contradictions result in schools when a journalism teacher/publications adviser must teach about the First Amendment's role in protecting the news media from governmental intrusion while at the same time serving as censor -- or standing idly by as the school principal censors -- during students' editing in the laboratory.

Research both before and after Hazelwood indicates that school administrators and publications advisers do not

consistently agree on the First Amendment's applicability to school media.[5] A national study completed soon after the decision indicates that two-thirds of school principals believe administrators should prohibit publication of potentially harmful articles in newspapers while only one-third of the advisers think this action should be taken.[6] Thus, there is potential serious conflict -- possibly leading to litigation -- as advisers and administrators interpret Hazelwood involving basic rights in the schools.

Advancements in journalism education have helped publications become more sophisticated. Problems ignored in bygone eras are more likely to be faced candidly and thoroughly by the nation's young journalists. Educators who work with these intelligent young people often want to encourage and stimulate their charges, not discourage or stifle their efforts and ideas.

But with advancements in student publication sophistication also comes conservatism in secondary schools as reflected in a national shift to the right.[7] A study of court opinions from the late 1960s through the early 1980s shows that when high school students were involved in judicial challenges, they won almost 80 percent of the time.[8] By contrast, three major Supreme Court cases dealing with students' constitutional rights since that time have been decided in favor of school officials.[9]

While all teachers in a secondary school must perform their duties cognizant of students' and their own rights, the publications adviser has some additional pressures. As one

commentator has written:

> [T]he journalism teacher's level of conduct and accountability may well exceed his or her academic peers in other disciplines because (1) the student output (i.e., the school newspaper) touches directly and immediately the lives of others, (2) the journalistic discipline itself is imbued with a Constitutional dimension not characteristic of most other academic fields, and (3) there is a professional journalism constituency that has, over the years, established certain (albeit voluntary) standards of conduct. Hence, the secondary school journalism teacher could conceivably be held accountable under the standards of care of both the teaching profession and the journalistic community.[10]

What student editors do has the potential to be an important means of intra-school communication, and their publications activities also carry with them most of the same legal considerations and obligations the professional press has. Also, publications activities are some of the only visible representations of the teaching/learning interchange that are widely shared in the school environment on a regular basis. The products of editors, staff members and teachers/advisers of newspapers, yearbooks and other media are scrutinized by administrators, faculty and the student body. Thus, the adviser's professional competency as an educator is held up for public accountability each time a publication is distributed.

Today's adviser holds a high-pressure position in a school when all of this is added to standard teaching loads and the demands of dealing with computers, supervising advertising solicitation, balancing books, attending to staff relationships, working after school and on weekends to assist students with deadlines, and a host of other responsibilities unique to publications production.

Hazelwood further complicates the adviser's role in that it

clearly establishes school authorities as publishers[11] of student-produced publications. Before Hazelwood and since 1969, high school journalism educators relied on Tinker[12] to support students as editorial decision-makers under the First Amendment.

Commentary about the differences between the cases and the changes in high school journalism since Hazelwood has been prolific,[13] but before examining the case from the perspective of potential dilemmas for advisers, a summary seems appropriate.

Three students filed First Amendment action after the excision by Principal Robert Reynolds of a two-page spread of the May 13, 1983, edition of Spectrum, the student newspaper at Hazelwood East High School in suburban St. Louis. Two of six stories were deemed inappropriate for high school readers -- one an anonymous-source story that recounted out-of-wedlock pregnancies of three Hazelwood students and the other an account by students concerning the effects of divorce on their families. Basically, the Court held that the paper was not a public forum for students, so the school officials had the right to impose reasonable restrictions on the paper. Also, the deletion of two full pages did not violate students' First Amendment rights because the principal believed the two stories on the pages violated the privacy of the pregnant students and the parent of a student.[14]

The Court also concluded that the school "need not tolerate speech that is inconsistent with its basic educational mission, even though government could not censor similar speech outside

school," and it said school officials had the right to impose "reasonable restrictions on speech that went into the newspaper" because it was part of the school curriculum and that the "journalism teacher retained final authority" regarding most aspects of production.[15] Also, educators had the right to greater control of student speech when it was school-sponsored than when students were engaged in personal speech or expression to assure that "participants learn whatever lessons (the) expressive activity is designed to teach," and to protect them from exposure to ideas that might be "inappropriate for their level of maturity, and that views of individual speaker(s) are not erroneously attributed to (the) school."[16]

Further, the Court in Hazelwood said that school officials should be able to set high standards for student speech that is associated with the school in an official manner and that the school could "refuse to disseminate speech that does not meet those standards." The school, through its officials (and the Court seemed to imply that included teachers), "may refuse to sponsor student speech which might reasonably be perceived to advocate conduct inconsistent with shared values of civilized social order, or which associates the school with any position other than neutrality on matters of political controversy."[17]

Only when censorship of student speech or expression has "no valid educational purpose" will the judiciary be required to intervene in protecting free speech rights in school publications, dramatic productions and the like.[18]

Even though it was the principal at Hazelwood East who pulled the pages before the paper went to press, it was the

temporary adviser who was required to submit paste-ups to him for prior review. The new adviser's predecessor, Robert Sturgos, left teaching in late April -- a couple of weeks before the incident -- for another job after feuding with the principal on a number of student press rights issues.[19] Because the adviser was named as a petitioner, the Supreme Court's various references to "school officials," "educators," "school authorities," and "a school" are often used interchangeably and thus indicate the Court's intent to align teachers (and presumably publications advisers and drama directors) with administrative policy and authority.

This reach in controlling school-sponsored speech extended to all aspects of the school's curriculum -- in classrooms and outside classrooms -- through teachers who derived their authority from the school hierarchy, according to the Hazelwood Court:

> These activities (plays, publications, and others) may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[20]

Teachers and publications advisers are clearly included in the Court's understanding of the administrative role of a school relating to student rights when it said in Hazelwood that

> . . . educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.[21]

But a substantial portion of advisers will probably take

offense at this clouded reasoning.[22] Well-established journalistic standards, a literal interpretation of the First Amendment, and considerable precedent among the top school publications would indicate that "legitimate pedagogical concerns" might very well include a more tempered application of the student press freedoms than the five justices in Hazelwood allowed.

For example, in making the newspaper at Hazelwood East a part of the school curriculum rather than a part of the school communication network, the Court, according to one commentator, created a learning atmosphere in which the adviser's lessons would have to be applied to the in-class situation only. One wonders why a school publication exists at all if its purpose is intended only for the benefit of those participating in the production activity:

> In this situation, it would not be accurate to think of the student-written but disapproved article in the school newspaper as an interception of the school's communication on its way to the student readers. The writers were the intended audience, and they have received the message. The newspaper readers have not received the school's message, but they were not the intended audience of the lesson. Since the lesson being taught through the school newspaper is aimed at the newspaper writers themselves, the newspaper is not like a science textbook or style manual. it is, rather, like homework or a term paper being 'corrected' by an instructor.[23]

Such a philosophy, as suggested by the Court, eliminates any consideration of the publications as media of expression, communication, entertainment, opinion or information. Advertising, computerized typesetting systems and printing plants would be unnecessary concerns to the adviser and the schools because there would be no audience. Students would

learn their journalistic lessons from texts, from homework and from laboratory exercises but they wouldn't publish for peers or others. In short, the "legitimate pedagogical concerns" of the journalism experience in schools, as defined by the Court in Hazelwood, have been neutered to such a degree that qualified journalism educators will probably take umbrage.

It is in this context that Justice Brennan, in his dissenting opinion in Hazelwood, wrote:

> The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved the daily operation of the school systems to the States and their local school boards . . . . We have not, however, hesitated to intervene where their decisions run afoul of the Constitution.[24]

The majority opinion of the Hazelwood Court seemed to disregard the teacher's (adviser's) role as a thinking person imbued with student concerns, pedagogical ideals or professional values. Yet, the federal and state court systems have provided a legacy of decisions directed toward educators that reflect a generally positive outlook on the importance of education in society.

II. Function of Education and Academic Freedom

Public education plays an inculcating role in the social order. Students, especially from kindergarten through high school years, acquire basic life skills, are socialized and enculturated. The teacher's place in the process is critical in the development of a student's formal education, and several courts have recognized this.

In a concurring opinion in Wieman v. Updegraff, Justice Frankfurter wrote, "To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is . . . not to indulge in hyperbole."[25] And besides being purveyors of democratic ideals, teachers are to inculcate other ideals as directed by local boards of education. According to the Supreme Court 30 years after Wieman,

> . . . local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."[26]

But along with traditional values, the federal court system has recognized the importance of instilling in students an understanding and the ability to exercise the democratic values held so dear by many citizens:

> The Supreme Court has more than once instructed that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (Shelton v. Tucker, 364 U.S. 479, 487, quoted in Keyishian v. Board of Regents, 385 U.S. 589, 603; Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 512.) Rightly called the "cradle of our democracy," our schools bear the awesome responsibility of instilling and fostering early in our nation's youth the basic values which will guide them throughout their lives.[27]

The court in James, in which an 11th grade English teacher was discharged for wearing a black arm band to class to protest the Vietnam War, warned that for teachers (and presumably their students)

> (t)he dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the

> transient majority can prove devastating to freedom of expression.[28]

Similarly, Justice Brennan contended that schools must tolerate some student expression "even if it offends them or offers views or values that contradict those the school wishes to inculcate."[29] The appellate court in James warned that administrators (those "charged with overseeing the day-to-day interchange between teacher and student") must "exercise that degree of restraint necessary to protect First Amendment rights."[30] The court cautioned teachers that they should not persuade students that their (the teachers') values are the only viable ones and that students necessarily ought to agree with them:

> Although sound discussions of ideas are the beams and buttresses of the First Amendment, teachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy.[31]

In the passages above, one can observe the underlying constitutional tension that all public school teachers face and, more immediately, what the journalism teacher/publications adviser struggles with as an implicit component of the job. One aspect of the tension is the belief that children should be indoctrinated into the shared values of society, a society in which the majority of the people decide which values should dominate in order to create social order. The other aspect is belief that certain values, regardless of majority consent, are fixed in the Bill of Rights. The latter belief, especially as applied to the school situation, has been operationalized as the "marketplace of ideas" viewpoint -- that society gains its strength from an open exchange of ideas and a wide acceptance,

or at least tolerance, of minority views.[32]

Supporters of strong teacher rights within the school structure also perceive the teacher as a stimulator of the marketplace-of-ideas view in the classroom and within the school generally.[33] For decades, the federal courts have supported this belief in dealing with teachers and students.

In 1943, the Supreme Court struck down a West Virginia State Board of Education law that required children to salute the flag and to say the pledge of allegiance. In relying on a marketplace-of-ideas concept, the Court said:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[34]

Fourteen years later, a New Hampshire teacher was found to have been deprived of his First Amendment rights when he was fired from the state university for not divulging the contents of a lecture and for refusing to answer inquiries from administrators about his involvement with the Progressive Party and its members.[35] In an eloquent concurring opinion, Justice Frankfurter described the Court's expanding philosophy regarding the marketplace of ideas as applied to the public classroom:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good -- if understanding be an essential need of society -- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.[36]

The school-as-marketplace concept was further extended by the Supreme Court in its landmark Tinker decision in which students had come to school wearing black arm bands in protest of the Vietnam War.[37] The Court, in finding that the students' First and Fourteenth Amendment rights had been violated when they were dismissed for this form of passive symbolic speech, noted that mere fear of disturbance is not sufficient cause to restrict students' (and teachers') freedom:

> . . . (I)n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.[38]

The Tinker court, in 1969, provided guidance on the administrative authority of school officials when that function

seemed to countermand the rights of individuals in the school. It addressed the dangers of a tightly controlled state curriculum that could stifle learning:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[39]

Lower courts used the marketplace-of-ideas approach when considering a teacher's methods in conducting class. In an 11th grade English discussion about taboo subjects, the teacher wrote a four-letter word depicting sexual intercourse on the chalkboard. The school board charged him with conduct unbecoming a teacher and dismissed him. A federal district court ruled that the controversial teaching method was used in good faith and that he could not be suspended or dismissed for using such a technique.[40]

> Our national belief is that the heterodox as well as the orthodox are a source of individual and of social growth. We do not confine academic freedom to conventional teachers or to those who can get a majority vote from their colleagues. Our faith is that the teacher's freedom to choose among options for which there is any substantial support will increase his intellectual vitality and his moral strength. The teacher whose responsibility has been nourished by independence, enterprise, and free choice becomes for his student a better model of the democratic citizen. His examples of applying and adapting the values of the old order to the demands and opportunities of a constantly changing world are among the most important lessons he gives to youth.[41]

The concept of the classroom as a marketplace of ideas coincides with judicial decisions that mesh the concept with another: "academic freedom."

Although "no court has squarely held that there is a distinct right of academic freedom which elevates the status of the teacher above that of other public employees" or the citizenry at large, the courts have addressed the issue on a number of occasions.[42] A "compelling state interest" must be present for any restriction on private speech or associational activities of teachers.[43] In the late 1780s, Alexander Hamilton wrote in The Federalist that "power over man's subsistence amounts to a power over his will."[44] As a result, teachers may claim protection from governmental threats of firing that violate their basic constitutional rights.

Development of the modern concept of academic freedom comes from 19th century Germany: lehrfreiheit, freedom to teach, and lernfreiheit, freedom to learn. A faculty member (primarily on the university level, although the American one-room schoolhouse afforded similar flexibility to elementary and secondary teachers) was free to educate in a manner that he or she determined most appropriate. The curriculum was also personally determined to suit the wishes of the individual teacher with only some consideration given the needs of students. "(U)niversity authorities or external agencies, such as government, impos(ed) only the most minimal restraints on either teacher or student."[45]

In its early development in the United States, the application of the constitutional rights of teachers was merely

a limitation on Congress -- that the federal government could not violate an individual's right to free speech. The Fourteenth Amendment[46] incorporated the First Amendment (and others) to prohibit state action that would abridge these rights. Because public schools are funded through the state and are subject to state regulatory powers, both teachers and administrators are public employees, and any action taken by them is vested with the authority that constitutes state action.

When school litigation is filed by today's teachers or students (or other members of the public) alleging a violation of constitutional rights, civil suits result that, for purposes of redress of grievances, apply the U.S. Code, section 1983.[47]

Academic freedom, as part of the First Amendment, has been implied in court cases throughout this century. In Meyer v. State of Nebraska,[48] a teacher in a private elementary school taught reading lessons in German in violation of state law. (A Nebraska statute required that all school teachers use the English language for school children in eighth grade or below. This law, apparently, attempted to help the many immigrants of the state learn English, the most common language in the United States.) The Court held that the teacher had a claim to his "legitimate vocation within the rights guaranteed by the Fourteenth Amendment."[49] His use of the German language (native to at least one child in the class and to himself) was permissible in that the state law invaded his liberty as a teacher and it exceeded the power of state authority.

A number of cases have dealt with teacher speech and

associational activities outside the curriculum. These have furthered the concept of academic freedom and the protections afforded teachers both in and out of the classroom.

For example, during the Cold War era, numerous states enacted loyalty oaths and associational requirements for their public employees, including teachers. An Oklahoma law required an oath that made it mandatory for teachers -- among others -- to swear they were not members of any organization listed by the U.S. attorney general as "Communist fronts" or "subversive."[50]

In a concurring opinion of the Court, which ruled in Wieman that the Oklahoma law violated the due process clause of the Fourteenth Amendment, Justice Frankfurter wrote:

> Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task of the conditions for the practice if a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government.[51]

By contrast, the Court in another 1952 case affirmed the legality of a state law in New York that made ineligible for employment any prospective -- or current -- employee to be a member of any organization advocating the overthrow of the government by force, violence or any unlawful means.[52] In a dissenting opinion, Justice Douglas, with whom Justice Black concurred, wrote that the Constitution guarantees freedom of

association, thought and expression to every person in society. "All are entitled to it; and none needs it more than the teacher."[53]

Other court decisions that helped support the notion of academic freedom for teachers include: Keyishian v. Board of Regents (a New York law was overturned that required teachers to certify that they were not now nor ever had been members of the Communist party);[54] Pickering v. Board of Education (the Court ruled that a teacher had the right to comment publicly about school funding through a letter to the editor of a local newspaper);[55] James v. Addison (teacher's right to wear a black arm band to school);[56] State Board for Community Colleges v. Olson (a newspaper teacher/adviser sought legal relief following funding cuts that eliminated the school newspaper. The court ruled that no injury resulted to her First Amendment rights to teach because of such action but that she was entitled to third-party standing for her students after an alleged deprivation of their rights).[57]

In light of these findings, some journalism educators will find it problematic that Hazelwood allowed an administrator to delete articles -- and complete pages -- under the guise of "legitimate pedagogical concerns."[58] Little evidence submitted indicates the administrator intended to teach any particular journalistic principle by the excision; thus, "the Court's framing of its explanation in the rhetoric of pedagogical intentions undermines the credibility of its own opinion."[59] Examination of the Hazelwood East journalism curriculum might lead an educator to conclude that in censoring the newspaper,

administrators actually violated the school board's approved curriculum of its advanced journalism class.[60]

A complementary notion of academic freedom is that the student has a right to learn, to know and to pursue truth. This, too, is undefined by the courts, and when applied to public education, the judiciary has differentiated between secondary school and higher education.

In Mailloux, a federal court said that while secondary schools "are not rigid disciplinary institutions, neither are they open forums" in which mature adults interact.[61] The court continued:

> Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which, though reasonable, is not approved by the school authorities or by the weight of professional opinion. A secondary school student, unlike most collegiate students, is usually required to attend school classes, and may not have choice as to his teacher.[62]

The Supreme Court looked to an open forum theory in a 1983 high school case involving access to teacher mailboxes. In Perry Education Association, the court upheld one teachers' association's right to unlimited access to mailboxes while denying equal access to a competing teachers' group.[63]

When content-based exclusions are made at high schools, the Court, in effect, created a six-pronged test to satisfy constitutional requirements: 1) Is the regulation required to serve a compelling state interest? 2) Is it narrowly drawn to achieve that end? 3) Are time, place and manner of expression consistent with the orderly operation of the school? 4) Is the expression content-neutral? 5) Is the exclusion tailored to serve a significant government interest? and 6) Are there ample

alternative channels of communication?[64] The Court distinguished the difference between a public forum and a limited public forum in the high school setting:

> In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.
>
> When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used.[65]

But in a dissenting opinion, Justice Brennan said that the concept of content neutrality negates the government's selection of topics that are appropriate in public because cases related to it often refer to the "prohibition against viewpoint discrimination and both concepts have their roots in the First Amendment's bar against censorship."[66]

The right of students to receive information was affirmed in a 1982 Supreme Court decision in which a board of education committee assigned to evaluate books had a disagreement with other board members about its recommendation to keep certain controversial books in the school library. In Board of Education v. Pico, high school students sued the board, alleging that its actions denied their rights under the First Amendment.[67] In overturning the committee's recommendation to keep the books in the library, board members reasoned that elimination of the books was necessary because they considered them "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[68] The Supreme Court held that "the right to receive ideas is a necessary predicate to the recipient's

meaningful exercise of his own rights of speech, press, and political freedom."[69]

In light of these decisions, Hazelwood raises troubling questions about the academic freedom of both teachers and students. The Court in Hazelwood seemed to suggest that the school newspaper, as a part of the curriculum, could not concurrently be a public forum. The Court said the school had not intended "to expand" the rights of student writers and editors on the school paper by "converting a curricular newspaper into a public forum."[70] According to one commentator:

> This suggestion, however, is clearly wrong. As a matter of educational policy a school could make participation in the publication of a school newspaper part of a course of study and, at the same time, give the students the authority to decide what should be published. Giving students this authority would enable them to apply what they have learned in the course. Under such an educational policy, the newspaper would be both part of the curriculum and a designated public forum for student expression.[71]

But in Hazelwood, the Court seemed to regard the students as sharers in the management of the school. This implies that they are some kind of quasi-agents of the state while serving on the school newspaper (or any school publication) staff. If so, the Hazelwood decision might be thought of as one that merely helps clarify the school's power to control its own media rather than as one which empowers administrators to limit student freedom of the press.

Thus far, an exploration has been made of selected court decisions that have addressed the goals of education, the school's role in inculcating ideas, the marketplace of ideas concept of education, the notion of academic freedom and its concomitant constitutional derivations, the rights of students

to receive ideas, and the forum theory in education.

To best understand the potential conflicts between a school publications adviser and an administrator when editorial questions arise, an equally important facet of the school environment needs to be examined: administrative power and authority.

III. Authority of Schools to Control Curriculum

A well-known axiom among educational administrators is that public school education is a state function that has federal interest but has local responsibility and control. In the United States education system, the state establishes the curriculum by law and then delegates its authority to local communities and school boards or school corporations.

A necessary corollary to local school board power to control the basic curriculum in schools is that school officials have considerable control over teacher classroom behavior,[72] particularly on the elementary and secondary school levels -- but in inverse relationship to the ages of students. The reasoning behind this philosophy of school board control is that the teacher, as an employee under contract, must carry out the policies and directives of the administration. Once the teacher deviates from these policies, the power of the state and the local school board is lessened.[73]

On the other hand, the Supreme Court has cautioned school officials that "freedoms of speech and of press, of assembly, and of worship may not be infringed . . . on slender grounds"[74] within the schools. Restrictions are allowable only "to prevent

grave and immediate danger to interests which the State may lawfully protect."[75]

The Court, in addressing a fundamental power of the state and local authorities to control its curriculum and its teaching staff, said in Adler:

> That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of the ordered society, cannot be doubted.[76]

In Epperson v. Arkansas, an "anti-evolution" statute was overturned by the Supreme Court in 1968. A high school biology teacher challenged state laws that prohibited a teacher in any state-supported school or university to use a textbook or teach that people descended from a lower order of animals.[77] While the decision was a victory for the academic freedom, Justice Black warned, in a concurring opinion, that the state has the "power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools."[78]

Supporting that viewpoint, a federal court ruled that a teacher did not have the right to teach birth control methods in a health class in violation of a state statute prohibiting such discussion.[79] The court said the statutes did not infringe on First Amendment rights of teachers within the state (of Michigan).

A federal appellate court ruled in 1979 that the school board had the right to restrict the use of certain books in an English elective program for high school juniors and seniors. Teachers raised First and Fourteenth Amendment questions about the restrictions in Cary v. Board of Education. The court held that a collective bargaining agreement between the teachers and

the school district did not waive constitutional rights but it still gave the board control over the "means of teaching any and all subjects."[80] The court examined closely the part of the agreement that stated: "final responsibility in the determination of the above rests with the Board." It ruled:

> We do not construe the sentence as a deliberate waiver of teachers' constitutional rights. Rather it seems a cautionary clause, a reminder that the board retains control over the techniques, methods and means of teaching the courses as is set forth . . . ."[81]

Thus, the court affirmed the school district's authority to control a curriculum as a means of serving the values of parents and taxpayers. In this case, the book decision, although colored by political and social viewpoints of board members, was allowed to stand.

Curriculum control by school officials was an issue in Hazelwood. One commentator describes it this way:

> A school's very reason for being is to educate, and it is impossible to educate except through the communication of messages. To communicate messages, the school needs to have resources and the ability to use those resources for its educational and communicating purposes. This in turn means that a school must have a manager or group of managers who decide how the school's educational resources will be used to communicate the school's educational messages. These managers cannot perform their managerial responsibilities if others, without their authorization, are given access to use resources in inconsistent ways.[82]

The messages and the means to transmit those curricular messages in a school include library materials, classroom texts, various other instructional matter, and, after Hazelwood, school plays and publications. All of these are the means of teaching. All are part of the curriculum.

Court decisions involving teachers' rights, however, have shown that elementary and secondary teachers have at least

limited control over the curriculum in their special areas. Consequently, when the judiciary attempts to balance external curriculum controls with teachers' individual classroom methods, First Amendment questions invariably arise. This area of the law is a "muddled field of constitutional jurisprudence filled with vague notions about free speech."[83]

Courts, generally speaking, have preferred to absent themselves in matters concerning school policy and the day-by-day operation of the schools. However, they have intervened in matters related to age of students[84] and to basic rights of school personnel.[85] The Supreme Court in Hazelwood said its decision to allow curricular control of the newspaper to be firmly in the hands of administrators was consistent with the view that "education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[86]

In determining whether a teachers' speech is constitutional within the classroom or the school setting, the Supreme Court has relied on its rulings in Tinker[87] and Sweezy.[88] The two facets of the test include the following: 1) freedom of speech can be infringed only when there is a relative certainty that there will be material or substantial disruption on school premises that is harmful to students, and 2) existing in the conflict is a specific nexus between the infringement of speech and a state interest that is vitally important.[89]

While the two-pronged test has been established to provide general guidance to courts in evaluating controversies between individual teachers' speech rights and the general policies of

the school board and administration, each new case must be considered separately. As the appellate court said in Mailloux, ". . . we see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech."[90]

> Clearly, the teacher's right must yield to compelling public interests of greater constitutional significance. It may be that it will be held by the Supreme Court that the teacher's academic right to liberty in teaching methods in the classroom (unlike his civic right to freedom of speech) is subject to state regulatory control which is not actuated by compelling public interests but which, in the judiciary's opinion, is merely "reasonable."[91]

Courts have also made it clear that teachers are state agents and not independent professionals who are free to determine their own curriculum content independent of the dictates of the state, local board or school.

If a teacher had complete control of content and method used in the classroom, students might be subjected to unwarranted and dogmatic pronouncements by the teacher. Rather than risking a haphazard approach to public school education, school boards attempt to assure students, by the hiring of qualified teachers, a curriculum that will introduce them to the values, ideals, knowledge, skills and understandings that can enable them to live a full and meaningful life beyond formal schooling. To achieve these ends, administrators are encouraged to entrust faculty with the "marketplace of ideas" construct while at the same time expecting teachers to not go beyond the bounds of the marketplace in a way harmful to their students or the school.

As Goldstein has pointed out:

> The cases involving restrictions on teachers' rights of curricular control are often erroneously viewed as censorship cases when the real issue is who should make curricular choices given the fact that someone has to make the choices. With regard to this issue, the arguments that the Constitution allocates curricular decision-making authority to the teacher are not persuasive. Professionalism is rejected as a basis for such a right because . . . teachers are not independent contractors but are part of a conventional employer-employee relationship, and because the only supportive reasons are policy, not constitutional arguments. Likewise, the freedom of expression rationale does not support a constitutional mandate of teacher curricular control. The freedom of expression justification for teacher control is premised on an analytical model of education which views school as a marketplace of ideas. There is no historical or precedential basis, however, for concluding that the marketplace of ideas model is constitutionally compelled over the traditional value inculcation model. Thus, in the final analysis, teachers' constitutional rights, in and out of the classroom, do not extend beyond the First Amendment rights of all citizens.[92]

A teacher-centered model of curriculum control would defy local and state control of education. In the present system, parents, community groups and the people they elect to serve in state government and on school boards form the basis of lay control of public education. This infrastructure, while in keeping with time-honored democratic values, also synchronizes more logically than does the "autocratic teacher control theory."[93]

Teachers must be able to make the day-to-day decisions that arise in educating students. The very nature of quality education demands that each teacher be able to use educational and experiential background, personality, emotion, the application of justice and ethics, and classroom management techniques in individualized and creative ways. But in this system of education, ultimate decisions, and final arbiters of conflicts, would seem to be centered in higher authority -- an

authority that in turn is shared with individual teachers.

An absolute "marketplace of ideas" concept cannot be applied to secondary school classrooms: Only a limited number of people can be teachers within a school -- and each, no matter how expert, can bring only a restricted world view into the classroom to share with students. Guest lecturers, supplementary materials and audio visuals, use of student publications and other means can help ameliorate the marketplace ideal, but the restricted nature of the schedule and overall structure of the educational system eliminate the possibility of a full-scale application of the model.

Another consideration is the captive nature of the secondary school audience. Teachers have great control of student grades, discussions, and decorum. They have more education and broader knowledge. Students, clearly, are no matches intellectually or emotionally for teachers in the typical classroom situation. Teachers and students do not have equal bargaining power in an unlimited marketplace of ideas concept. The market has to be controlled by forces beyond those within the classroom to protect students.

In Hazelwood the Court tacitly included the publications adviser as an agent of the school board's authority when it addressed the board's power to control Spectrum newspaper content. Board policy at the high school said, "Publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism."[94] However, the policy also stated that school publications were "developed within the adopted curriculum and its educational implications."[95] The

Court concluded that "one might reasonably infer from the full text of (the) policy . . . that school officials retained ultimate control over what constituted 'responsible journalism' in a school-sponsored newspaper."[96]

Hazelwood confirmed earlier court decisions that provided insight into teachers' places within the system and the authority they shared with school boards -- and the authority school boards had over them: Adler v. Board of Education (the state could properly inquire into the associations, fitness and loyalty of current and prospective teachers);[97] Mercer v. Michigan State Board of Education (the First Amendment does not allow an employed teacher "the right to teach beyond the scope of the established curriculum," nor does the teacher have a constitutional right to "overrule parents' decision as to courses their children will take unless the state has in some manner delegated such responsibility to the teacher");[98] Cary v. Board of Education of the Adams-Arapahoe School Dist. (censorship, or suppression of opinion, in classes "should be tolerated only when there is a legitimate interest of the state which can be said to require priority");[99] Epperson v. Arkansas (teachers do not have a "constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed).[100]

IV. Conflicts: Teacher Freedom vs. School Authority

When the constitutional rights of teachers and the legal responsibility of school officials to fulfill their state mandated responsibilities in educating children intersect,

litigation often ensues because there can be no easy answers to differences that are so fundamental.

Hazelwood has the potential for producing a serious confrontation between teachers and administrators. It exposes "competing and complementary values in a political system that treats free expression as central to the pursuit of truth, while recognizing the social need for some limitations on individual speech and inquiry."[101]

Free expression of teachers, in the classroom and in related learning activities affiliated with the school, flows from a model that says citizens, including public servants, should be free of government control in matters of speech, association, conscience and press. What might be called the "public utility" model, on the other hand, presents the notion that while individual First Amendment rights are important for teachers, those rights are subsumed because of a concern for communal (school) interests as prescribed by the state.[102]

When teachers feel aggrieved in constitutional matters that embody free speech, they have every reason to carry the proceedings to court. But this extreme action is often the last resort in a personal, adversarial relationship between teacher and administrator that has roots much deeper than law -- and one that has built up over a long time. Such adversarial relationships among people who should be partners in the educational mission tends to ruin the learning atmosphere in the areas of the involved parties -- and perhaps beyond that scope as well.

But even if the roots of a grievance are personal or

philosophical, First Amendment claims, along with disputes involving the due process clause and equal protection guarantees, are among the most frequent constitutional challenges raised by teachers in dismissal or disciplinary proceedings.[103] Supreme Court and lower court decisions provide a mixed series of rulings that both uphold academic freedom in the classroom as a constitutional right as well as those which leave administrators questioning the degree to which their authority extends.[104]

Buss has described the conflict between the two competing points of view:

> This profound tension would exist even if we had no notion of judicial review. Individuals, communities, and government officials would have to find the golden mean between the inconsistent demands of these two powerful norms. The same tension resonates within the constitutional arguments that are invoked when the courts are asked to resolve the conflict between the inculcation of values model and the marketplace of ideas model. Until very recently, the courts resolved these difficult questions by wholesale deferral to the judgments of educators and the political community.[105]

Traditionally, the courts have steered clear of matters involving the curriculum in public schools. But even when they have become involved, they have shown reluctance to serve as quasi-administrators. As Justice Burger wrote in his dissent in Board of Education v. Pico:

> In an attempt to deal with a problem in an area traditionally left to the states, a plurality of the Court, in a lavish expansion going beyond any prior holding under the First Amendment, expresses its view that a school board's decision concerning what books are to be in the school library is subject to federal-court review. Were this to become the law, this Court would come perilously close to becoming a "super censor" of school board library decisions.[106]

On the other hand, Justice Fortas, writing for the majority

in Epperson, affirmed that the Court would

> . . . apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[107]

Justice Black, while concurring with the majority in Epperson, nevertheless displayed the tension he felt when the two school ideologies clashed, and he deployed his philosophy on the judiciary's role in school administration:

> Notwithstanding my own doubts as to whether the case presents a justiciable controversy, the Court brushes aside these doubts and leaps headlong into the middle of the very broad problems involved in federal intrusion into state powers to decide what subjects and schoolbooks it may wish to use in teaching state pupils. While I hesitate to enter into the consideration and decision of such sensitive state-federal relationships, I reluctantly acquiesce.[108]

Courts have constructed a general balancing test in which they weigh the extent of possible public interest in the employee's speech or constitutional right compared with the interest of the state or school in maintaining order or efficiency.[109]

These tensions involving teachers may be observed in three areas involving rights of teachers: 1) right to association, loyalty oaths as prerequisites to teaching and other personal, non-classroom constitutional principles;[110] 2) academic freedom and other classroom-related activities; and 3) the right to criticize administrative and other officials. The latter two will be the focus of the remainder of this paper because they most closely associate with possible ramifications of

Hazelwood.

Meyer and Epperson are two cases providing guidance when conflicts arise between teacher subject-matter control in the classroom and state curriculum control.

In Meyer, the Supreme Court found deficient a state law that forbad the use of non-English language in classrooms of students who had not yet passed the eighth grade.[111] But the case did not address the issue of a teacher violating orders from direct superiors within the school -- it involved the broader Nebraska state law forbidding such a teaching method within the curriculum.

Similarly, in Epperson a high school biology teacher challenged Arkansas' "anti-evolution" statute. In writing for the majority of the Court, Justice Fortas wrote that states had the right to set public school curricula but it did not include the "right to prohibit teaching scientific theory or doctrine for reasons that run counter to the principles of the First Amendment."[112]

In a concurring opinion, Justice Stewart agreed that states have power to control the curriculum in schools but that they should not be able to punish teachers when teachers include classroom activities related to "an entire system of respected human thought" that the state might have eliminated.[113]

Under such restrictions, an individual teacher might feel professionally derelict in not providing the fullest, most comprehensive and balanced approach possible in exploring a subject matter with students.

Van Alstyne has written that teachers should not be subject

to "arbitrary restrictions in the course of their own inquiries or upon their own communicated classroom references."[114] He continues:

> One may not, as a condition of his employment, be made an implement of governmental practices which are themselves violative of the First Amendment. Accordingly, a teacher violating a statutory restriction forbidding reference to, or consideration of, a source of opinion or information otherwise within the proper compass of his subject should be as much shielded by the First Amendment from prosecution or dismissal as a social worker refusing to conduct a midnight search forbidden to the state by the Fourth Amendment.[115]

Implications for the journalism teacher and publication adviser following Hazelwood abound in light of Van Alstyne's premise. Certainly First Amendment theory and practice are curriculum necessities in a journalism classroom. The potential confrontation comes when the school publication is thought of as an official part of the curriculum (as opposed to an open forum) under the Hazelwood decision. From a teacher's (adviser's) point of view, the publication by journalistic tradition is a curricular tool for the practice of journalism, which includes protections provided by the First Amendment and the Constitution generally. When an administrator decides to censor such a curricular vehicle, it means that the state is violating both its mandated curriculum and is implementing a practice violative of the First Amendment, which it has been charged to protect in the schools.

These contradictions, for teachers, would seem to have no easily resolvable solution legally or philosophically. Cases following Meyer and Epperson shed additional light however.

When a Massachusetts secondary school English teacher wrote a slang word for sexual intercourse on his classroom

chalkboard, officials fired him for violating a statement in the ethics policy stating that teachers need to recognize the "supreme importance of the pursuit of the truth, devotion to excellence and to nurture democratic citizenship."[116] The court found the dismissal improper because the code was vague and would not validly justify a post facto decision by school administrators to fire Mailloux for use of a specific teaching method.

The court did qualify its decision in Mailloux by saying that the First Amendment does not give teachers a license to say, write or do anything they want in the name of academic freedom. But it did say that the use of potentially controversial teaching methods involving the Constitution must depend on such considerations as 1) the "age and sophistication of the students," 2) "the closeness of the relation between the specific technique used and some concededly valid educational objective," and 3) "the context and manner of presentation."[117]

The role of expert witnesses in a proceeding following a teacher dismissal for questionable classroom methods is another contribution of the Mailloux court:

> The weight of the testimony offered leads this court to make an ultimate finding that plaintiff's methods served an educational purpose, in the sense that they were relevant and had professional endorsement from experts of significant standing. But this court has not implied that the weight of opinion in the teaching profession as a whole, or the weight of opinion among English teachers as a whole, would be that plaintiff's methods were within limits that, even if they would not themselves use them, they would regard as permissible for others.[118]

A similar type of case was brought before the appellate court, Eighth Circuit, in 1972 -- a controversy involving a

teacher who used non-traditional classroom methods. Unlike the teacher in Mailloux, however, the high school economics teacher from a Nebraska high school was not reinstated after her administrative battles over her unusual style in class.[119] In Ahern, the teacher had been discharged after allowing her students to make decisions about their curriculum, tests and other classroom management techniques. Because of lack of discipline and feuds with other faculty members, and after her students had irreparable conflicts with a substitute teacher, the principal dismissed her on charges of insubordination -- charges that stuck throughout the legal process.

The principal had asked Ahern to return to conventional teaching practices, to restore discipline, and to teach economics (instead of politics) in her classroom. When she "willfully disobeyed" these directives, she was dismissed. Her First Amendment claim (among others) was denied.[120] The court said she had no Constitutional right 1) "to persist in a course of teaching behavior which contravened the valid dictates of her employers," or 2) to teach a subject (politics) when she was contracted to teach economics.[121]

Similar in outcome was a Ninth Circuit court of appeals case in which a non-tenured journalism teacher/adviser was not rehired based on charges of insubordination, failure to obey school rules and failure to cooperate with school officials as a teacher. In Nicholson, the teacher claimed protection under the First and Fourteenth Amendments.[122] Nicholson's disputes with the principal began -- and continued -- when he refused to show the administrator sensitive articles that were to

appear in the school newspaper. The principal claimed he never censored articles he disapproved of -- but that he wished only to ensure accuracy of controversial pieces. The principal's standards for review included the "Rotary International Four-Way Test" for standards: Was the communication based on 1) truth, 2) fairness, 3) good will, and 4) benefit of majority?[123]

The problem in Nicholson was that several other issues regarding professional competency were intermingled with the Constitutional questions involving censorship of the student newspaper and his role as adviser. For example, the court heard evidence that Nicholson had a history of poor record-keeping, had failed to complete and turn in various called-for lists and surveys of the school, had not submitted identification numbers on school equipment that resulted in the loss of textbooks, had taken unauthorized field trips with students, and had circulated a survey in the school without prior approval.[124]

The degree to which negative employment decisions may be based on the exercise of one's Constitutional rights -- and the degree to which those rights precipitated negative employment decisions when intervening circumstances were also part of the consideration for denial of non-renewal -- will be addressed later.[125]

A Colorado Supreme Court case also involved First Amendment claims of a journalism teacher who was newspaper adviser at a community college. The court held that, contrary to Olson's claim that her First Amendment rights were violated when a curricular vehicle -- the student newspaper -- was denied

funding from the school, her personal rights were not abridged.[126] The court described the relationship between the newspaper as a means of student expression and the adviser's use of it as a learning tool in the established curriculum:

> While the decision to terminate funding of the News might arguably have implicated the First Amendment expression rights of students, it did not abridge the constitutionally protected aspect of Olson's teaching function. Whether the newspaper is published or not, Olson's freedom to choose an appropriate method for classroom presentation of the idea-content of her journalism courses remains unfettered, as does her ability to select those ideas and principles that she believes will enrich the educational experience of her students.[127]

In Hazelwood, by contrast, the newspaper was declared an official part of the curriculum whereas in Olson the paper was a "co-curricular activity funded by the student senate and ancillary to the formal educational process" at the school.[128] The court held that when the paper is not part of the established official curriculum of the school, it found "no basis under existing First Amendment jurisprudence to vest a teacher with an affirmative right to require (a school) to allocate funds for a particular student activity in order to enhance the pedagogical goals of the teacher."[129] For reasons cited both earlier and later in this paper, the designation of Spectrum at Hazelwood East as a part of the curriculum might afford the teacher-adviser a more substantial and reasonable First Amendment claim.

Given the wide visibility of publications in a school, and given the tensions that naturally occur between administrative officials and advisers over sensitive content that results when curious teen-agers take their lessons seriously, it is not

unreasonable to assume that teacher-advisers might occasionally engage in public or private criticism of school officials with whom they disagree on matters journalistic. An examination will be made of court decisions stemming from criticism between teachers and their administrators.

Certainly a teacher who criticizes a principal jeopardizes the employer-employee relationship, and depending on the circumstances and content of the speech, might be setting oneself up for some type of disciplinary action, if not dismissal. As one commentator has written:

> In short, except in situations where a teacher fails to fulfill contractual obligations, disruptive speech is tolerated to varying degrees outside the classroom. However, it is evident that once the school classroom door closes, a teacher is not free to vent his criticism to the students. Courts uniformly agree that students should not suffer the consequences of teacher dissatisfaction with academic policy.[130]

A case could be made, however, for teachers' rights to criticize school authorities based on the fact that those superiors are public officials. In Wieman, for example, Justice Black offered these comments in a concurring opinion with the majority of the Court:

> It seems self-evident that all speech criticizing government rulers and challenging current beliefs may be dangerous to the status quo. With full knowledge of this danger the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press or public assembly is still more dangerous. This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest. It means that Americans discuss such questions as a right and not on sufferance of legislatures, courts or any other governmental agencies.[131]

Under guidelines set forth in Tinker and Sweezy, teacher criticism could be allowed in many classroom situations. Only

when the criticism is so "malicious and untrue that (the teacher's) superiors are in a position of complete derogation" would courts affirm negative employment decisions of administrators.[132] That type of criticism would be harmful to the proper functioning of a well-respected educational institution, and students would be affected because they would no longer be able to put their trust in school leaders. If the teacher's derogatory statements in a class led to such student thinking, the classroom (and the school) would be disrupted because of the harm done to the reputations of school administrators, and courts would no doubt find fault with such behavior under well-established judicial standards.[133]

A 1968 Supreme Court case sheds light on a teacher's right to criticize the administration outside the classroom setting. In Pickering[134] an Illinois teacher wrote a letter to the editor of a local newspaper criticizing school board allocation of funds between academic and athletic programs. The board members thought Pickering's role as a teacher precluded him from making public statements (in the form of a letter) that as a private citizen he otherwise would have been able to make freely. The Court held the opposite view but pointed out in the process a balancing test used in subsequent court decisions:

> . . . (I)t cannot be gainsaid that the State has interests as an employer in regulating speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[135]

The Court pointed out that teachers as a group were well-

qualified to form opinions and to speak out on public matters, especially as they related to the operation of the public schools. Further, teachers should be able "to speak out freely on such questions without fear of retaliatory dismissal."[136]

Even though Pickering's statements contained some erroneous information, the Court held that his writing in no way interfered with his daily schoolroom duties or the regular operation of the school. In such an instance, the Court concluded that the school hierarchy "in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[137] Thus, a greater flexibility is allowed teacher speech when it is removed from daily duties and part of the public debate. Such latitude is not available, however, when the subject of debate is part of the teacher's job description or employment expectations.

Some speech not generally considered matters of public concern could involve such incidents as arguing, running disputes, and personal grievances -- types of conduct that distract or disenable a teacher from doing one's job properly. But administrators must be able to show serious disruption or "actual, substantial, material interference" within the school context in order for their position to outweigh the teacher's speech rights.[138]

In 1977, the Supreme Court further refined the guidelines set forth in Pickering in analyzing actionability of teacher speech outside the classroom setting in its Mount Healthy v.

Doyle decision.[139] Doyle, an untenured Ohio teacher, called a local radio station and gave it the substance of an administrative memo that dealt with a dress code for teachers. Complicating the case was Doyle's questionable performance as a teacher and school representative, according to court records. For example, he had a fight with another teacher, he argued with cafeteria employees, he swore at students, and he made obscene gestures to some female students.[140]

The Court vacated and remanded the case to lower courts for determination using a new standard for balancing the teacher's rights in such a situation. It held that the initial burden is placed on the teacher to show that one's conduct is constitutionally protected and that this conduct was a substantial or motivating factor in the school's decision to punish or dismiss. Following that, the employer is required to show by a "preponderance o evidence" that it would have reached the same decision about the teacher's re-employment even in the absence of the protected conduct. If this last prong of the test is satisfied, the action will most likely not be considered to have violated the teacher's constitutional rights.[141]

Even though the teachers in both cases were able to comment on "matters of public concern," neither Pickering nor Mount Healthy specifically defined the parameters of what these matters included. But what they did introduce was the concept that even though teachers could comment on public issues, they might also be subject to "balancing" factors that clearly have a chilling effect on almost any type of controversial speech.

While both Pickering and Mount Healthy involved teachers using local media for their exercise of free speech about school policies, the Supreme Court in Givhan, 1979, provided a new dimension to teacher speech critical of the school administration.[142] Bessie Givhan was dismissed from her junior high school English teaching job after a heated argument in the principal's office. The subject of discussion was the effectiveness of desegregation in their Mississippi school district. Givhan thought the district should be more responsive, but the principal, in justifying Givhan's dismissal, had deemed her demands and method of delivering them as "insulting, hostile, loud and arrogant."[143] The Court held that the First Amendment is not lost to the public employee who "arranges to communicate privately with (her) employer rather than to spread views before the public."[144]

Givhan's concerns about racial desegregation were deemed public enough -- and important enough -- to outweigh the negative effects of a strained relationship between her and the principal. But in a 1983 case involving a state employee upset about a transfer within the department had the opposite outcome, an outcome that was derived from the balancing factors contained in Pickering and Mount Healthy.

In 1983 the Supreme Court decided a case in favor of a public employer's right to fire a staff member whose behavior was deemed an internal grievance rather than a matter of public concern. In Connick v. Myers former assistant district attorney Sheila Myers alleged that her First Amendment rights were violated when she was dismissed following a dispute with

District Attorney Connick concerning, among other things, a transfer to another division within the office and the expected involvement of office members in upcoming political campaigns. As part of her disagreement with Connick, Myers formulated and distributed an office survey following a dispute. Her superiors interpreted the survey activity as "disruptive to internal office matters."[145]

While not a school-related case, Connick nevertheless has relevance here because it deals with state employees conducting state business -- similar to the professional relationship expected of teachers and their principals. In Connick the employer was found not negligent in the dismissal because in this case Myer's speech was found to be not protected when the balancing test was applied. In commenting on the administrator's need to manage internal policy and office procedure, the Court said:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.[146]

Wide jurisdiction is thus afforded public employers in their office firing decisions. "Unfair," "mistaken" and "unreasonable" dismissal decisions will not merit legal intrusion, according to the Court, provided those faulty decisions do not intrude on matters "fairly considered" of public concern to the community. Even though Myers was

concerned about a conflict of interest she might have because of the proposed transfer, and even though she questioned the appropriateness of campaigning for political candidates that might influence the district attorney's office, the Court held that those issues were insufficient to override the employer's decision to dismiss her.

One of the mitigating factors was Myers' use of a survey to elicit the morale of colleagues. The Court held that

> Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.[147]

On the other hand, the Court also cautioned administrators to "be receptive to constructive criticism offered" by employees. However, "the First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs."[148]

A several-step review process has thus been constituted in evaluating public employees' (including teachers') dismissals when speech rights are involved. The review analysis includes guidelines set forth in the Supreme Court decisions of Pickering, Mount Healthy, Givhan and Connick -- all of which involve teacher or public employee criticism of superiors:

1. Was the speech in question protected in that it involved matters of legitimate public concern?

2. If a matter of legitimate public concern, was the school's (or public agency's) response to the speech justified

in light of the need for order, efficiency and integrity in its operation? Some considerations:

A. the need for harmony in the work place;

B. whether the efficient operation requires a close working relaticnship between teacher and principal and whether or not the speech in question has caused or could cause the relationship to deteriorate;

C. the time, place and manner of the speech;

D. the context in whicn the dispute arose;

E. whether the speech detracted from the teacher's ability to perform one's duties.

3. Was the school's (or agency's) action motivated by the employee's protected conduct or were there other constitutionally neutral factors that would have ended with the same result in the absence of the protected conduct?[149]

Connick has the effect of chilling teacher criticism, especially since teachers will be unable, in advance, to determine what will be constituted as matters of "legitimate public concern" as distinguished from matters of office policy, organizational management or other more internally oriented issues.

In potential disputes involving a publications adviser and a principal in this post-Hazelwood time, courts undoubtedly will examine the three factors above carefully. If the dispute involved matters directly related to Constitutional issues or the school curriculum, greater possibility would exist that the matter was of "legitimate public concern." However, if the conflict between the two parties dealt with speech related to

other policies, operational matters, job performance, and the like, it seems likely that the full measure of the three-point analysis would be applied -- and that the adviser would stand far less a chance to claim constitutional protection in a dismissal proceeding.

But when an adviser's personal speech rights are not directly involved in a dispute with school officials, it is possible that the adviser's advocacy of students' free press rights could be the source of dispute with the principal.

The court system generally follows the maxim that they "will find no standing when persons seek to assert rights of third persons not before the court."[150]

However, the Supreme Court, in a case involving the rights of state workers to engage in partisan political activities, ruled that

> (l)itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.[151]

In the 1982 case involving the dismissal of Don Nicholson as newspaper adviser, the appellate court held that he was entitled to "assert the rights of his students just as effectively as they would themselves" and that he was entitled to challenge the "school official's actions as applied to his students."[152]

Further precedent in this area has been established in the Olson decision of the Colorado Supreme Court in 1984.[153] The court held that Judith Olson did not have a First Amendment claim after the community college's newspaper was denied

funding since she did not demonstrate any injury to her right to teach. But it did grant her third-party standing to challenge the funding cuts as they affected her students. The court held that

> Olson has sufficiently demonstrated, at least for the purpose of third party standing, that the administrative decision to terminate funding of the News has a chilling effect on the free speech rights of the students and their related associational activity in exercising those rights through the medium of a student publication funded in whole or in part by the college. Under these circumstances, we believe that Olson should be accorded third party standing to challenge the funding decision on behalf of the students.[154]

Based on the precedents regarding standing in matters of First Amendment issues, it is not unreasonable to add this notion to the balancing test established in Pickering, Connick, et al. That is, if a court establishes that the journalism teacher/adviser has third-party standing for students in a dispute with the principal, then the remainder of the balancing test would be applied should the speech-related activity between the two parties be the cause of dismissal or other damage.

V. Due Process Rights of Teachers

Thus far, teacher First Amendment rights directly and indirectly related to the school have been examined. Tied closely to those rights are ones found in the due process clause of the Fourteenth Amendment, which has become "increasingly relevant to the protection of teachers at public educational institutions from arbitrary treatment."[155]

One commentator has written that a teacher may not use the First Amendment as a shield when the person has failed to

perform expected duties of employment.[156] However, it has become increasingly apparent that both school administrative officials and the judiciary are sensitive to the thorough application of the Fourteenth Amendment in dismissal or nonrenewal of teachers.

For example, in Mailloux, no specific regulations existed in the school that disallowed the teacher from using a sexually explicit word, often considered taboo, in his English class. The federal court held that Mailloux was supported by two kinds of safeguards in his classroom techniques: a substantive right to choose a method he deemed most effective and one that in the court's view "served a demonstrated educational purpose," and a procedural right not to be discharged for the use of a method not clearly designated by the school as improper.[157]

In 1972 the Supreme Court rendered opinions in two cases that dealt with establishment of standards under which faculty members in public schools are entitled to due process proceedings if their dismissal negatively affects a liberty or property interest as provided through the Fourteenth Amendment.[158] Liberty interests include charges of fraud, untruthfulness, and the like; injury to reputation through abrupt dismissal of a long-term employee; damage to reputation that might harm the prospects of future employment; and charges of racism, sexism, or mental incompetence. A property interest is the physical value -- and anticipated physical value -- of the teaching position one holds.[159] In the latter case, tenured teachers have greater expectation of and entitlement to property interests because of their past merits. Nontenured

teachers might have little recourse to a due process hearing or proceeding in the event of nonrenewal because the extent of their property interest is defined within the terms of a short-term contract.[160]

An example of a nontenured teacher's dilemma in this regard occurred in the 1972 Roth case.[161] Roth held a one-year political science teaching appointment at the University of Wisconsin-Oshkosh in 1968-9. Several hundred teachers had such contracts and only a handful were not re-employed, one of whom included Roth. He claimed that the real reason for nonrenewal was his criticism of the administration's lack of efforts in meeting needs of minorities on campus. No reason was given for nonrenewal, so Roth took the problem to the courts alleging infringement of Fourteenth Amendment rights based on his exercise of the First Amendment. He further alleged that the failure of administrators to give him notice in advance and an opportunity for a hearing violated the procedural due process clause.[162]

The Supreme Court held that Roth failed to show that the decision not to rehire was based on his free speech activities.[163] The Court pointed out that Wisconsin Board of Regents rules provide that nontenured teachers dismissed during the school year have an opportunity for a formal campus review -- and perhaps judicial -- if some constitutional right is involved. However, the rules "provide no real protection for a nontenured teacher who simply is not re-employed for the next year." Rather, the teacher must be informed by a certain date (February 1) concerning non-retention or retention, but "no

reason for non-retention need be given. No review or appeal is provided in such case."[164]

Regarding Roth's claims of a violation of his liberty interests under the due process clause, the Court held that the university's action did not produce a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities" for public employment at other colleges in-state or out-of-state.[165]

And in the matter of Roth's claims that he was denied property interest in the dismissal, the Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.[166]

Roth's appointment was for one year only. "Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year," according to the Court.[167] While Roth surely had "an abstract concern in being rehired," the Court found that he had no "property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."[168]

In two pre-Pickering cases, the Court had held that the nonrenewal of nontenured public school teachers' one-year contracts could not be based on their First and Fourteenth Amendment rights. [See Shelton v. Tucker, 364 U.S. 479 (1960) and Keyishian v. Board of Regents, 385 U.S. 589 (1967).] However, in a companion case to Roth, the Perry v. Sindermann

Court determined that more specific property interests were present in a nontenured teacher's situation that merited further action by lower courts.[169]

Robert Sindermann had been a teacher in the Texas college system for 10 years before critical statements he made as president of a state teachers association about the Board of Regents policies brought about his nonrenewal. While the Regents claimed "insubordination" in a news release, they provided Sindermann no statement of reasons for his dismissal nor an opportunity for a hearing to challenge the nonrenewal.[170]

There was no tenure system as such in the Texas college system at the time of Sindermann's service (1959-69). But at Odessa College, where he taught, the faculty handbook provided a statement that said faculty members should "feel" that they have "permanent tenure as long as . . . teaching services are satisfactory" and as long as they "display a cooperative attitude toward . . . co-workers and . . . superiors."[171] The Court stopped short of overruling school officials, but it did say that Sindermann should be given the opportunity to show that he had a legitimate property interest, based on reasonable expectations of what amounted to tenure, and to show that the nonrenewal was predicated on exercise of his First Amendment rights. Proof of either would not necessarily grant him reinstatement, the Court held, but "such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."[172]

In Mount Healthy v. Doyle,[173] despite Doyle's several questionable actions as an educator, the Court vacated and remanded the case to a lower court so that it could determine whether or not Doyle's administratively critical phone call to a radio station played a "substantial part" in his nonrenewal. The Court held that "he may . . . establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."[174]

A federal court case from 1980 is also instructive when journalism advisers look to property and liberty interests protected by the due process clause as they relate to their appointments. In Johnson v. San Jacinto Junior College[175] John R. Johnson held a one-year contract as registrar. After an extramarital affair with a school librarian, his registrar's contract was not renewed and he was "demoted" to his regular position of history teacher at the two-year college. Just as in Roth, the court ruled that Johnson's property interests (for legal purposes) did not include any expectation beyond the period of the contract.[176] (However, because Johnson was found to have been unlawfully demoted during the period of his annual registrar's contract, he was entitled to lost wages for denial of procedural due process.) The court held:

> Plaintiff is not entitled to reinstatement as Registrar because his protectable property interest in being Registrar extended through only one academic year and his ineligibility for the position was reaffirmed in a due process hearing before the next academic year.[177]

The court also held that Johnson should also be entitled to due process protection for a "liberty interest in his

reputation if the defendants subjected him to a badge of infamy in the course of changing his job classification to teacher." But in order to prove this, Johnson would have had to show that during the course of his troubles the school had "made a statement or prepared a report without giving him notice and an opportunity to be heard that was a) false, b) stigmatizing, and c) published."[178] Johnson was unable to do this.

And in Nicholson, the Mount Healthy test was also applied because several factors related to Nicholson's competency as a teacher and school newspaper adviser were intermingled with his claim that his nonrenewal as a nontenured teacher and adviser was based on his refusal to allow the principal prior review of sensitive news stories.[179] Because Nicholson was unable to meet the burden of proof that the constitutional issue played a substantial role in nonrenewal, the school did not have to prove by a "preponderance of evidence" that it would have reached the same decision.

In light of these cases, non-tenured teachers with regular one-year appointments, or those who hold one-year appointments to serve as publications advisers in high schools, seem to have little recourse if their contracts are not renewed by the renewal deadline each year. No administrative reasons need be offered, nor is there a legal entitlement to a hearing on the matter, unless specified by state or local law. However, under the Pickering, Mount Healthy, Givhan, Connick standards, even if precipitating causes for the nonrenewal appear to be rooted in the teacher's constitutionally protected rights (which the teacher must be able to demonstrate), and the teacher brings

charges to that effect, the school administrators would have to show only that the same outcome would have been reached regardless of the protected activity.

VI. Summary and Conclusions

After Hazelwood, the high school publications adviser's job has become more complex than ever. While the adviser in the case was included as a petitioner with the principal (and other officials), common practice indicates that the two parties are sometimes at odds in matters concerning content of student publications. An adviser's loyalties to student learning and rights may conflict with a principal's desire to control content in the name of curricular leadership.

Pedagogically journalism education teaches the democratic values of citizen involvement. If Hazelwood permits censorship only on pedagogical grounds, the window of permission must be small indeed. Only under narrow circumstances could one teach democratic values by discouraging vocal involvement in the social issues of today's world.

Federal and state courts have issued several decisions directed toward educators that reflect a generally positive outlook on the importance of education in society. In light of these findings, some journalism educators find it difficult to reconcile the Hazelwood Court's approach to a curriculum that allows administrative censorship of articles or complete pages under the guise of "legitimate pedagogical concerns."[180] Little, if any, evidence submitted in the case indicated the administrator intended to teach any particular journalistic

principle by the excision. Examination of the Hazelwood East journali-m curriculum might lead an educator to conclude that in censoring the newspaper, administrators actually violated the district's approved journalism curriculum.[181]

While school authorities and the state have authority in establishing school curricula, court decisions involving teachers' rights have shown that elementary and secondary school teachers have at least limited control over the curriculum in their special areas. Consequently, when the judiciary attempts to balance external curriculum controls with teachers' individual classroom methods, First Amendment questions can arise. This area of the law is a "muddled field of constitutional jurisprudence filled with vague notions about free speech."[182] There are no easy answers to differences that are so fundamental.

First Amendment theory and practice are curriculum necessities in the journalism classroom and laboratory in which school publications are produced. The potential confrontation comes when the school publication is thought of as an official part of the curriculum under the Hazelwood decision. When a principal or other administrator censors such a curricular activity, it means that the state is violating both its mandated curriculum and First Amendment rights of citizens.

The Hazelwood Supreme Court decision was one in which administrative authority of the state, through appointed officials, took precedence over First Amendment rights of student journalists. But in siding with school officials to control the curriculum in this way, the Court also seemed to

overlook the many curricular decisions it and other courts have rendered in the past which favored academic freedom. But Hazelwood involved students as plaintiffs and school officials, including the teacher, as defendants. After Hazelwood, journalism educators siding with First Amendment traditions might find themselves caught in the midst of what could be a major Constitutional dilemma. For those educators who are unable to resolve the tension through normal channels, litigation becomes a possibility. Should that occur, courts would have to determine the delicate balance between the journalism educator's professional duty to teach and practice First Amendment lessons and school officials' perceived need to control the curriculum by denying those same activities.

Endnotes

[1] 108 S.Ct. 562 (1988).

[2] See, for example, Gambino v. Fairfax County School Board, 429 F.Supp. 731 (E.D. Va. 1977), 564 F.2d 157 (4th Cir. 1977); Zucker v. Panitz, 299 F.Supp. 102 (S.D. N.Y. 1969); Fijishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972); Jacobs v. Board of Commissioners, 490 F.2d 601 (7th Cir. 1973); Scoville v. Board of Education of Joliet Township, 425 F.2d 10 (7th Cir. 1970).

[3] Supra note 1 at 565.

[4] Tinker v. Des Moines School District, 393 U.S. 503 (1969).

[5] E.g., see J.W. Click and Lillian Lodge Kopenhaver, "Principals' and Newspaper Advisers' Attitudes Toward Freedom of the Student Press in the United States," (paper presented at the Association for Education and Journalism annual convention, Norman, Oklahoma, August 4, 1986); _____, "Opinions of Principals and Newspaper Advisers Toward Student Press Freedom and Advisers' Responsibilities Following Hazelwood v. Kuhlmeier," (paper presented at the Association for Education in Journalism and Mass Communication annual convention, Minneapolis, Minnesota, August 1990); David L. Martinson, Peter Habermann, and Lillian Lodge Kopenhaver, "Examining the Gap in How Advisers, Administrators Perceive Important Student Press Issues," (paper presented at the Association for Education in Journalism and Mass Communication annual convention, Minneapolis, Minnesota, August 1990); and Tom Dickson, "How Advisers View the Status of High School Press Freedom Following the Hazelwood Decision," (paper presented to the Association for Education in Journalism and Mass Communication annual convention, Washington, D.C., August 1989).

[6] J. William Click and Lillian Lodge Kopenhaver, "Principals Favor Discipline More Than a Free Press," 43 Journalism Educator (Summer 1988):48-51.

[7] E.g., see Luella P. Rogers, "High School Press Pressures," Freedom of Information Report No. 460:1. Columbia, Missouri (1982).

[8] John L. Strope Jr., School Activities and the Law (Reston, Virginia: The National Association of Secondary School Principals, 1984), p. 32.

[9] New Jersey v. T.L.O., 105 S.Ct. 733 (1985) (school authorities may search student lockers when they have reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or the rules of the school); Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986) (school authorities may punish students who use sexually explicit or metaphorical language in school activities or classes even if it is neither legally

obscene nor causes substantial disruption); and Hazelwood, supra note 1 (school authorities may justify restraints on the official school newspaper because of its role within the curriculum and because it is not a public forum for student expression).

[10] Louis A. Day, "Tort Liability of the Public Secondary School Journalism Teacher for Investigative Reporting Assignments" (paper presented at the Association for Education in Journalism annual convention, Athens, Ohio, July 1982), p. 21.

[11] Supra note 1 at 570.

[12] Supra note 4.

[13] E.g., see J. Marc Abrams and S. Mark Goodman, "End of an Era?: The Decline of Student Press Rights in the Wake of the Kuhlmeier Decision" (paper presented at the Association for Education in Journalism and Mass Communication annual convention, Portland, Oregon, July 1988); Dorothy Bowles, "Hazelwood v. Kuhlmeier: National Press Reaction to the Decision and Its Impact in Tennessee High Schools" (paper presented at the Association for Education in Journalism and Mass Communication Mid-winter Meeting, St. Petersburg, Florida, January 1989); William G. Buss, "School Newspapers, Public Forum, and the First Amendment," 74 Iowa Law Review 505 (1989); Louis A. Day and John M. Butler, "Hazelwood School District v. Kuhlmeier: A Constitutional Retreat or Sound Public Policy?" (paper presented at the Association for Education in Journalism and Mass Communication annual convention, Portland, Oregon, July 1988); Thomas Eveslage, "Hazelwood v. Kuhlmeier: A Threat and a Challenge to High School Journalism," Quill & Scroll (February-March 1988):9-10; Thomas Eveslage, "The Supreme Court on Hazelwood: A Reversal on Regulation of Student Expression," ERIC Digest No. 8 (1988); "Hazelwood: Experts React to Decision Against Freedom for Student Journalists," Student Press Law Center Report (Spring 1988):3-13, 35-45; Louis E. Ingelhart, "Analysis and Evaluation of a Decision of Supreme Court of the United States No. 86-836 Hazelwood School District, et al., Petitioners v. Cathy Kuhlmeier et al." (unpublished paper circa Spring 1988, 102 pp.); Robert P. Knight, "High School Journalism in the Post-Hazelwood Era," 43 Journalism Educator (Summer 1988):42-47; Kay D. Phillips, "Freedom of Expression for High School Journalists: A Case Study of Selected North Carolina Public Schools" (paper presented at the Association for Education in Journalism and Mass Communication annual convention, Washington, D.C., August 1989); Jan C. Robbins, "Student Press and the Hazelwood Decision," Fastback 274 (Bloomington, Indiana: Phi Delta Kappa Educational Foundation, 1988); and Benjamin Sendor, "Managing the Student Press: Consider Carefully Before You Unsheath (sic) the Censor's Scissors," The American School Board Journal (April 1988):24-25.

[14] Supra note 1 at 562, 566.

[15] Ibid., 563.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] For a discussion of the case from a sociological perspective, see Steve Visser, "A Civics Lesson at Hazelwood East," The Nation (Oct. 24, 1987), pp. 441-442.

[20] Supra note 1 at 570.

[21] Ibid., 571 (emphasis added).

[22] E.g., see supra notes 5, 6.

[23] Buss, supra note 13 at 521.

[24] Supra note 1, 573-4 (Brennan, J., dissenting).

[25] Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

[26] Board of Education v. Pico, 457 U.S. 853, 864 (1982) quoting Brief for Petitioners 10.

[27] James v. Addison, 461 F.2d 566, 568 (1972), cert. den. 409 U.S. 1042 (1972).

[28] Ibid., 575.

[29] Supra note 1 at 575 (Brennan, J., dissenting).

[30] Supra note 27 at 574.

[31] Ibid., 573.

[32] Buss, supra note 5 at 505.

[33] Frank R. Kemerer and Stephanie Abraham Hirsh, "The Developing Law Involving the Teacher's Right to Teach," 84 West Virginia Law Review:31, 51 (October 1981).

[34] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-2 (1943).

[35] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[36] Ibid., 261-262.

[37] Tinker, supra note 4 at 503.

[38] Ibid., 508-9.

[39] Ibid., 511.

[40] Mailloux v. Kiley, 323 F.Supp. 1387 (1971); aff'd. 448 F.2d 1242 (1971).

[41] Mailloux, 323 F.Supp. 1387, 1391 (1971).

[42] "Developments in the Law: Academic Freedom," 81 Harvard Law Review at 1065 (1968).

[43] Ibid.

[44] Alexander Hamilton, The Federalist No. 79 at 235 (Fairfield ed.).

[45] Stephen R. Goldstein, "The Asserted Constitutional Right of Public School Teachers to Determine What They Teach," 124 University of Pennsylvania Law Review 1299 (1976).

[46] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, amend. XIV, section 1.

[47] U.S. Code, section 1983 (1976): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in any action of law, suit in equity, or other proper proceeding for redress."

[48] Meyer v. State of Nebraska, 262 U.S. 390 (1923).

[49] Ibid., 391.

[50] Supra note 25, 183.

[51] Ibid., 196-7.

[52] Adler v. Board of Education, 342 U.S. [illegible] (1952).

[53] Ibid., 508 (Douglas, J., dissenting).

[54] Keyishian v. Board of Regents of The University of the State of New York, 385 U.S. 589 (1967).

[55] Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968).

[56] Supra note 27.

[57] State Board for Community Colleges v. Olson, 687 P.2d 429 (Colo. 1984).

[58] Supra note 1 at 571.

[59] Buss, supra note 13 at 513-4.

[60] E.g., the textbook in use at the time was Earl English and Clarence Hach, Scholastic Journalism, 6th ed. (Ames, Iowa: Iowa State University Press, 1978). See, in particular, ch. 21, "Understanding Press Law."

[61] Supra note 41 at 1392.

[62] Ibid.

[63] Perry Education Association v. Perry Local Educators' Assn., 460 U.S. 37 (1983).

[64] Ibid., 45.

[65] Ibid., 55.

[66] Ibid., 59 (Brennan, J., dissenting.)

[67] Board of Education v. Pico, 457 U.S. 853 (1982).

[68] Ibid.

[69] Ibid., 867.

[70] Supra note 1 at 568-569.

[71] Buss, supra note 13 at 510.

[72] Supra note 33 at 37-38.

[73] Ibid.

[74] West Virginia v. Barnette, supra note 34 at 639.

[75] Ibid.

[76] Adler v. Board of Education, supra note 52 at 493.

[77] Epperson v. Arkansas, 393 U.S. 97 (1968).

[78] Ibid., 113 (Black, J., concurring).

[79] Mercer v. Michigan State Board of Education, 379 F.Supp. 580 (E.D. Mich., 1974).

[80] Carey v. Board of Education of the Adams-Arapahoe School District, 598 F.2d 535 (10th Cir., 1979).

[81] Ibid., 539.

[82] Buss, supra note 13 at 512-3.

[83] Howard O. Hunter, "Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools," 25 William and Mary Law Review 4 (1983).

[84] Doris B. Truhlar, "Cary v. Board of Education: Academic Freedom at the High School Level," 57 Denver Law Journal 39 (1980).

[85] M. Chester Nolte, "Can Your Policies Withstand Constitutional Challenges?" 166 The American School Board Journal 37 (June 1979).

[86] Supra note 1 at 571.

[87] Supra note 9.

[88] Supra note 35.

[89] E.g., see Janice L. Reynolds, "Free Speech Rights of Public School Teachers: A Proposed Balancing Test," 30 Cleveland State Law Review 673, 679 (1981).

[90] Mailloux v. Kiley, 448 F.2d 1242, 1243 (1971).

[91] Mailloux v. Kiley, 323 F.Supp. 1387, 1391 (1971).

[92] Supra note 45, 1355-6.

[93] Ibid., 1356.

[94] Supra note 1 at 569.

[95] Ibid.

[96] Ibid. (emphasis added).

[97] 342 U.S. 485, 493 (1952).

[98] 379 F.Supp. 580, 581 (E.D. Mich., 1974).

[99] 598 F.2d 535, 543 (10th Cir., 1979).

[100] 393 U.S. 97, 113-4 (Black, J., concurring).

[101] Hunter, supra note 83 at 3.

[102] Ibid., 71.

[103] Gerald A. Caplan, "First Amendment Claims by Public Employees," in Thomas N. Jones and Darel P. Semler, eds., School Law Update . . . Preventive School Law (ERIC Microfiche EA 016748), p. 23.

[104] Supra note 33 at 23.

[105] Buss, supra note 13 at 506.

[106] 457 U.S. 853, 885 (Burger, J., dissenting).

[107] Supra note 77 at 104.

[108] Supra note 77 at 110-1 (Black, J., concurring).

[109] Martin H. Malin and Robert Ladenson, "University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection," 16 U.C. Davis Law Review 950-1 (1983).

[110] E.g., see West Virginia v. Barnette, supra note 34; Adler v. Board of Education, supra note 52; Wieman v. Updegraff, supra note 25; Sweezy v. New Hampshire, supra note 35; Beilan v. Board of Education, 357 U.S. 399 (1958) (the Court ruled that administrators could dismiss a teacher on the grounds of "incompetency" and "insubordination and lack of frankness and candor" when he refused to answer questions related to his affiliations with the Communist Party. Beilan claimed the questions about his associational activities had no relevance to his tenured teaching position in the Philadelphia Public School system); and Keyishian v. Board of Regents, supra note 54.

[111] Supra note 48.

[112] Supra note 77 at 107.

[113] Epperson v. Arkansas, 393 U.S. 97, 116 (1968) (Stewart, J., concurring in the result).

[114] William Van Alstyne, "The Constitutional Rights of Teachers and Professors," 1970 Duke Law Journal 857 (1970).

[115] Ibid.

[116] Mailloux v. Kiley, 448 F.2d 1242 (1st Cir., 1971).

[117] Ibid., 1243.

[118] Ibid., 1390.

[119] Ahern v. Board of Education of School District of Grand Island, 456 F.2d 399 (8th Cir., 1972).

[120] Ibid., 403.

[121] Ibid., 403-4.

[122] Nicholson v. Board of Education, 682 F.2d 858 (9th Cir., 1982).

[123] Ibid.

[124] Ibid., 862.

[125] E.g., see supra notes 130, 139, 145, 161.

[126] Supra note 57, 438.

[127] Ibid.

[128] Ibid., 438.

[129] Ibid., 439.

[130] Joan M. Eagle, "First Amendment Protection for Teachers Who Criticize Academic Policy: Biting the Hand That Feeds You," 60 Chicago Kent Law Review 250 (1984).

[131] Supra note 25 at 194 (Black, J., concurring).

[132] Supra note 89 at 689.

[133] Ibid.

[134] Supra note 55.

[135] Ibid., 568.

[136] Ibid., 572.

[137] Ibid., 572-3.

[138] Supra note 130 at 259.

[139] Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

[140] Ibid.

[141] For an expanded discussion of Mount Healthy, see, for example, J. Albert Ellis, "Public Teachers' Right to Free Speech: A 'Matter of Public Concern,'" 12 Southern University Law Review 217 (1986).

[142] Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

[143] Ibid.

[144] Ibid., 415-416.

[145] Connick v. Myers, 461 U.S. 138 (1983).

[146] Ibid., 146-7.

[147] Ibid., 154.

[148] Ibid., 149.

[149] For further analysis, see, e.g., Caplan, supra note 103 at 26-7; and Ellis, supra note 141 at 226.

[150] Mercer, supra note 79 at 612 (emphasis added).

[151] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[152] Nicholson, supra note 122 at 863.

[153] Supra note 57.

[154] Ibid., 440.

[155] Supra note 42 at 1077.

[156] Eagle, supra note 130 at 248.

[157] 323 F.Supp. 1387, 1390 (1971) (emphasis added).

[158] Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context," 6 Journal of Law and Education 279, 300 (1977) (emphasis added).

[159] Ibid., 302.

[160] Ibid.

[161] Board of Regents v. Roth, 408 U.S. 564 (1972).

[162] Ibid., 568-9.

[163] Ibid., 575.

164 Ibid., 567.

165 Ibid., 573-4.

166 Ibid., 577.

167 Ibid., 578.

168 Ibid.

169 Perry v. Sindermann, 408 U.S. 593 (1972).

170 Ibid., 595.

171 Ibid., 600.

172 Ibid., 603.

173 429 U.S. 274 (1977).

174 Ibid., 284.

175 498 F.Supp. 555 (S.D. Texas, 1980).

176 Ibid., 569.

177 Ibid., 571.

178 Ibid., 572.

179 Supra note 122 at 862.

180 Supra note 1 at 571.

181 Supra note 60.

182 Supra note 83.